

EXHIBIT D

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

3 SECURITIES INVESTOR PROTECTION
4 CORPORATION, IRVING H. PICARD,

5 Plaintiffs,

6 v.

12 MC 115 (JSR)

7 BERNARD L. MADOFF INVESTMENT
8 SECURITIES LLC, et al.,

9 Defendants.

Conference

10 -----x

11 New York, N.Y.
12 October 12, 2012
13 4:40 p.m.

14 Before:

15 HON. JED S. RAKOFF

16 District Judge

17 APPEARANCES

18 NATHANAEL S. KELLEY
19 Attorney for SIPC

20 BAKER & HOSTETLER LLC
21 Attorneys for Trustee Picard
22 BY: OREN J. WARSHAVSKY
23 LAN HOANG

24 ANDERSON KILL & OLICK, P.C.
25 Attorneys for Initial Transferees
BY: TODD E. DUFFY
DENNIS J. NOLAN

LATHAM & WATKINS LLP
Attorneys for Subsequent Transferees
BY: CHRISTOPHER HARRIS

1 (Case called)

2 THE COURT: I'm going to try to keep this as short as
3 possible because I don't think the economy can stand having to
4 pay for all the lawyers in this room. This, unlike some of the
5 issues that have come before the Court involving the Madoff
6 matters, is one that the Court has previously dealt with.
7 Between that and the extensive briefing, I have reached some
8 tentative conclusions, although I will make no final
9 conclusions until I've heard oral argument and issued a written
10 opinion.

11 My tentative conclusion is that the standard that the
12 trustee must meet to establish lack of good faith under a
13 willful blindness approach, as opposed to an actual intent
14 approach, is that the defendant must subjectively believe that
15 there is a high probability that a fact exists and the
16 defendant must then consciously turn away or otherwise take a
17 deliberate step or decision to avoid learning of that fact.
18 Essentially, with a very slight massaging, the test set forth
19 in Global-Tech Appliances v. SEB, 131 S.Ct. 2060, 2070, a 2011
20 decision of the Supreme Court.

21 I am also of the view that in an action brought under
22 section 550, the burden is on the trustee to -- I'm sorry. I
23 think I'm overstating where my head is at on the second thing.
24 I'm not sure whether the burden of establishing good faith is
25 on the defendant or the burden of establishing lack of good